Supreme Court, U.S.
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No. 87-2117

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

JAMESBURY CORP.,

*Petitioner,*

v.

LITTON INDUSTRIAL PRODUCTS, INC.,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## PETITIONER'S REPLY BRIEF

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Litton, in its response, cites case law dealing with the power of a district court to reconsider its earlier decision where there has been no final judgment and no appeal in the interim.[1] Litton assumes that this law is applicable since, although there was a final judgment in 1983 and an appeal therefrom,[2] this appeal did not include the laches and estoppel issue. However, the only reason the appeal did not include this issue was because Litton chose not to include it. Litton can not benefit by deliberately choosing not to cross appeal. As so aptly articulated by Judge Friendly—"It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost."[3] On remand, the district court did not have, as Litton suggests, the discretion to simply change its mind. After a final judgment and an appeal, the law of the case must be followed unless there is a strong showing of changed circumstance[4]

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[1] Corporacion de Mercadeo Agricola v. Mellon Bank International, 608 F.2d 43 (2d Cir. 1979) and Dictograph Products Co. v. Sonotone Corp., 230 F.2d 131 (2d Cir.), cert. dismissed, 325 U.S. 883 (1956).

[2] Jamesbury Corp. v. Litton Industrial Products, Inc., 756 F.2d 1556 (Fed. Cir. 1985).

[3] Fogel v. Chestnutt, 668 F.2d 100, 109 (2d Cir. 1981), cert. denied, 459 U.S. 828 (1982).

[4] "We have repeatedly stated we will not depart from this sound policy [law of the case] absent 'cogent' or 'compelling' reasons." Doe v. New York City Dept. of Social Services, 709 F.2d 782, 789 (2d Cir.), cert. denied, 104 S.Ct. 195 (1983). "The major grounds justifying reconsideration are 'an intervening change of controlling law, the availability of new evidence, or

and there is no dispute in the case at bar that Litton did not even attempt to make such a showing.[5]

Litton, in its response, concludes, with little discussion as to the basis therefor, that this case presents "no questions of major importance."[6] However, in these days of overcrowded dockets and of discussion of removing diversity from federal jurisdiction in order to reduce the federal case load, it is important that, whenever possible, all issues be considered in a first appeal so that a case can be concluded without the necessity of second and subsequent appeals. The Federal Circuit's holding, contrary to this Court's applicable decisions, that a prevailing party has no right to cross appeal, precludes the attainment of this objective. Likewise, in order to conserve valuable judicial resources, it is important that an issue be tried only once unless there is a strong showing of changed circumstance. The Federal Circuit's holding encourages just the opposite by permiting an issue, already once tried, to be tried again with no change in cir-

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the need to correct a clear error or prevent manifest injustice.' " Id.

[5] Had Litton made such a showing, there would have been no need for it to argue that it had no right to cross appeal.

[6] Litton's brief at 4. Litton also asserts "no conflicts between jurisdictions" but the Federal Circuit's decision that a prevailing party has no right to cross appeal is in clear conflict with this Court's decisions in Montogomery Ward & Co. v. Duncan, 311 U.S. 243 (1940) and Dandridge v. Williams, 397 U.S. 471 (1970). Litton also notes that Jamesbury's petition does not involve "constitutional questions." However, two years ago, this Court granted a petition for writ of certiorari in a patent case involving, like the case at bar, an important point of federal civil procedure (the "clearly erroneous" requirement of rule 52(a)). Dennison Mfg. Co. v. Panduit Corp., 106 S.Ct. 1578 (1986).

cumstance as long as the issue was withheld from a prior appeal.

It is respectfully requested that the petition for writ of certiorari be granted.

Respectfully submitted,

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